DEPARTMENT OF HUMAN RIGHTS

November 30, 2018

REF: 66093
Margaret Campbell
v.
Honor the Earth

Honor the Earth
ATTN: Winona LaDuke
607 Main St
Callaway MN 56521

This letter is to inform you that the appeal of the No Probable Cause determination issued in this case has been completed. Enclosed is the order affirming the prior determination.

No new information was provided or identified which would justify a reversal of the Department's original determination.

Sincerely,

Kevin M. Lindsey, Commissioner
Minnesota Department of Human Rights

Enclosure(s)

c: Frank Bibeau

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ORDER

Having duly considered the arguments made by the charging party in her appeal of the prior NO PROBABLE CAUSE determination made in the above-referenced charge, I hereby affirm the prior determination, pursuant to Minnesota Statutes, §363A.28, subd. 6(c).

Upon review and consideration, I conclude:

1. On August 17, 2018, the Minnesota Department of Human Rights (Department) completed its investigation into the charging party's allegations of sex discrimination and reprisal in the area of employment and issued a NO PROBABLE CAUSE determination.

2. The charging party submitted a timely appeal of the no probable cause determination.

3. On appeal, charging party asserted that the Department failed to properly weigh the evidence in determining that charging party's sexual harassment claim was untimely. She further asserted that the Department failed to properly weigh the evidence, and failed to consider other available evidence, in determining that respondent did not engage in reprisal against charging party or constructively terminate her employment.

4. In considering whether the Department should uphold the original determination, I have reviewed the Department's record of the investigation and the charging party's request for reconsideration.

Background

5. Respondent is a Native American-led environmental advocacy organization headquartered on the White Earth Ojibwe reservation. It is a non-profit corporation, formed and registered under the laws of the State of Minnesota.

6. Charging party is a non-Native female who performed work for respondent from 2009 until February 5, 2015.[1] Most, but not all, of her work was performed on the White Earth reservation.

7. On multiple occasions during her tenure with respondent, charging party reported that a male coworker had sexually harassed her. She claimed that some of the harassment occurred on the reservation, and some occurred outside the reservation. She claimed that the last act of sexual harassment occurred in December 2014.

8. Meanwhile, in November 2014 charging party learned that the alleged harasser had been accused of committing child sexual abuse a number of years earlier. Armed with this

[1] The parties disputed whether charging party was an employee or independent contractor. The Determination assumed that charging party was an employee, and therefore proceeded to analyze her claims in the area of employment. Since neither party took issue with this aspect of the determination, it will not be addressed in detail here. Suffice it to say that charging party produced evidence tending to show that she was an employee rather than a contractor, under the factors set forth in *Hanson v. Friends of Minnesota Sinfonia*, 181 F.Supp. 2d 1003, 1006-1007 (D. Minn. 2002). Respondent's sole evidence to the contrary – documentation reflecting the issuance of 1099 forms to charging party in 2013, 2014 and 2015 – was insufficient to overcome this showing.

information, charging party and a group of victim advocates from other organizations met with respondent's Executive Director on January 28, 2015. They told the Executive Director that charging party's male coworker was a sexual predator, and demanded his firing. The Executive Director said she needed some time to look into the matter.

9. In the days that followed, the Executive Director spoke with some of respondent's board members about the situation, and attempted to arrange an interview with charging party's male coworker. She also placed the male coworker on a leave of absence.

10. Dissatisfied with the Executive Director's deliberate approach, charging party attempted to bring the matter to a head. In addition to speaking directly with board members, on or about February 1 she spoke with an influential community activist who was not affiliated with respondent. She shared information about respondent's internal affairs with the activist, who in turn contacted members of respondent's board to discuss that information.

11. Respondent suspended charging party on February 4, 2015, for disclosing internal, confidential information to an outsider. She quit her job the next day, explaining in her resignation letter that she was doing so "because I have been sexually harassed, and retaliated against for reporting this harassment."

Discussion

A. *Jurisdiction/Immunity*

12. Preliminarily, the investigation file reveals that respondent was uncooperative throughout the investigation. It produced no witnesses or documentation in response to the charge or the subsequent information request, and insisted that the department lacked jurisdiction over it.

13. Although respondent did not appeal the Department's decision to exercise jurisdiction over charging party's claims, I have reviewed the jurisdictional facts and law and am satisfied that the Department has jurisdiction over charging party's discrimination and reprisal claims. *See Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 290-291 (Minn. 1996). Here, as in *Gavle*, at least some of the allegedly discriminatory actions occurred outside of the reservation.[2]

14. I also note that even in instances where a state may have jurisdiction over certain claims against a tribal entity, the exercise of jurisdiction is not always appropriate. In some circumstances, a tribal entity may avail itself of the defense of sovereign immunity. *Id.*, 555 N.W.2d at 294.[3] This can be true even where, as here, the entity is a state-chartered non-profit corporation. *See In re Ransom v. St. Regis Mohawk Education & Community Fund, Inc.*, 86 N.Y.2d 553, 658 N.E.2d 989, 993 (1995).

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[2] Respondent ignored this critical fact in each of its submissions.

[3] The principal factors in determining whether a tribal business entity should be extended the protection of sovereign immunity enjoyed by the tribe itself are "1) whether the business entity is organized for a purpose that is governmental in nature, rather than commercial; 2) whether the tribe and the business entity are closely linked in governing structure and other characteristics; and 3) whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the business entity." Id.

15. Here, however, respondent's failure to provide information rendered the Department unable to meaningfully analyze whether respondent was entitled to sovereign immunity. Its answer contained a single, unverified assertion that it is a "native led, non-profit organization primarily targeting services on White Earth Reservation, and across the Chippewa treaty ceded territories, primarily for the benefit of Chippewa tribal members ..." This unsupported allegation was insufficient to establish a sovereign immunity defense.[4]

16. Accordingly, the Department's exercise of jurisdiction was proper.

B. *Sexual Harassment*

17. As noted above, charging party claimed that she was subjected to various acts of verbal sexual harassment by a male coworker, the last of which she alleged occurred in December 2014. She did not file her charge of discrimination, however, until January 29, 2016.

18. As the investigator properly noted, "A claim of an unfair discriminatory practice must be brought as a civil action...or filed in a charge with the commissioner within one year after the occurrence of the practice." Minn. Stat. 363A.28, Subd. 3. Since the discrimination charge was filed more than one year after the last alleged act of sexual harassment, the investigator determined that the sexual harassment claim was untimely.

19. On appeal, charging party argued that her sexual harassment claim should be considered timely under the "continuing violation" exception discussed in *Giuliani v. Stuart Corp.*, 512 N.W.2d 589, 595 (Minn. Ct. App. 1994). In that sexual harassment case, the Court of Appeals recognized that an exception to the one-year limitations rule is appropriate where "the unlawful employment practice manifests itself over time, rather than in a series of discrete acts." Id.

20. Charging party's reliance on *Giuliani*, however, is misplaced. In that case, the court went on to explain, "To establish a continuing violation, a plaintiff must show that at least one incident of ***harassment*** occurred within the limitations period." Id., 512 N.W.2d at 595 (emphasis added).

21. Charging party contended that her alleged retaliatory suspension and constructive discharge – two separate discrimination claims, which allegedly occurred within the limitations period – render her sexual harassment claim timely under the continuing violation exception. In making this contention, however, charging party mischaracterized the above-quoted statement from the Giuliani decision, substituting the word "discrimination" for "harassment."

22. Here, charging party conceded that no act of sexual harassment occurred during the limitations period. Her allegations that respondent committed different discriminatory acts within the limitations period are insufficient to invoke the continuing violation exception on her sexual harassment claim.

23. Accordingly, the investigator correctly determined that charging party's sexual harassment claim was untimely.

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[4] In a subsequent submission to the Department, respondent actually advised that it was not asserting a sovereign immunity defense.

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C. *Reprisal*

24. Charging party's next claim was that respondent suspended her on February 4, 2015, in reprisal for her complaints of sexual harassment.

25. This claim is analyzed using a three-part burden-shifting framework. First, charging party must state what is called a "*prima facie*" reprisal claim. If – and only if – she does so, then the respondent must articulate a legitimate, non-retaliatory reason for its actions. Then the charging party must show that the respondent's stated reason was pretextual. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)

26. As the investigator recognized, in order to establish a *prima facie* reprisal claim, a charging party must show that (i) she engaged in statutorily protected activity; (ii) she was subjected to an adverse action; and (iii) a causal connection exists between the two. *Bahr v. Capella University*, 788 N.W.2d 76, 81 (Minn. 2010).

27. Charging party showed that she engaged in protected activity on January 28, 2015, when she told respondent that she "wanted to move forward with an official complaint ... for the ongoing sexual harassment" by the male coworker.

28. However, her subsequent communication with an outside community activist – in which she discussed past accusations of sexual assault against the male coworker and disclosed confidential information concerning respondent's internal affairs – was clearly not protected activity. The community activist was not affiliated with respondent or any entity with enforcement responsibilities, and the subject matter of charging party's disclosures did not implicate the Minnesota Human Rights Act (MHRA).

29. While it is undisputed that respondent took an adverse action against charging party when it suspended her on February 4, 2015, a thorough review of the investigation file shows that she was unable to establish a causal relationship between her suspension and her January 28 sexual harassment complaint. Indeed, charging party had complained of sexual harassment on at least two prior occasions, and although she was not satisfied with respondent's response to her complaint, she did not claim that respondent ever retaliated against her for prior complaints.

30. Rather, charging party's own testimony and documentation indicate that the February 4 suspension decision was the direct result of her subsequent – and unprotected – disclosures of information to the community activist. Charging party conceded that she made the confidential disclosures to the activist, and that respondent identified those disclosures as the reason for her suspension.

31. As the investigator properly noted, the MHRA's reprisal provision does not insulate a charging party from the consequences of her unprotected behavior.[5]

[5] Even in situations where a charging party makes a complaint of actionable discrimination, she is not insulated from punishment where the manner in which the complaint was made was disruptive or violated company rules.

32. Accordingly, because charging party was unable to show a causal connection between her prior protected activity and the suspension, she was unable to state a *prima facie* reprisal claim.

D. Constructive Discharge

33. Charging party's final claim was that she was discriminatorily discharged. Specifically, she claimed that her February 5, 2015 resignation constituted a "constructive discharge."

34. Like the reprisal claim discussed immediately above, a discriminatory discharge claim is analyzed with a three-step burden-shifting framework, under which charging party must first state a *prima facie* claim.

35. To establish a *prima facie* discriminatory discharge claim, the charging party must generally show that: (i) she is a member of a protected class; (ii) she was qualified to perform her job; (iii) she suffered an adverse employment action; and (iv) the facts give rise to an "inference of discrimination." *See, e.g., Takele v. Mayo Clinic*, 576 F.3d 834, 838 (8th Cir. 2009).

36. Here, the first two elements were undisputed. Charging Party attempted to satisfy the third and fourth elements by showing that she was "constructively discharged" by respondent as a consequence of enduring a discriminatory work environment.

37. Indeed, Minnesota courts have recognized that a "constructive discharge" resulting from a hostile work environment can satisfy the third and fourth prongs of a charging party's *prima facie* case. *Coursolle v. EMC Ins. Grp., Inc.*, 794 N.W.2d 652, 660–61 (Minn. Ct. App. 2011).

38. A constructive discharge occurs when an employee resigns in order to escape intolerable working conditions caused by illegal discrimination. *Continental Can v. State*, 297 N.W.2d 241, 251 (Minn.1980). Because it must result from illegal discrimination, constructive discharge must be viewed as a companion allegation which may only be maintained where a charging party can establish some separate, underlying act of illegal discrimination.

39. Here, as discussed above, charging party was unable to establish an underlying act of discrimination. She was therefore unable to show that she was constructively discharged, and no further analysis of this claim is warranted.

Conclusion

40. Accordingly, the Commissioner finds no basis for vacating the no probable determination or remanding the case for additional investigation as the Department's decision is supported by the record.

41. The NO PROBABLE CAUSE Order of August 17, 2018, is affirmed, and the findings of fact and law submitted in the Department's original Memorandum are incorporated herein by reference.

See, e.g., Alvarez v. Royal Atlanta Developers, 612 F.3d 1253, 1270 (11th Cir. 2010); Windross v. Barton Protective Services,586 F.3d 98, 104 (1st Cir. 2009); Nelson v. Pima Community College, 83 F.3d 1075, 2012 (9TH Cir 1996).

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42. Although the Department will not pursue this charge further, the charging party may bring a private civil action against the respondent in state district court within 45 days, pursuant to Minnesota Statutes, §363A.33, subd. 1(2).

THEREFORE, IT IS ORDERED that the above-referenced charge be, and the same hereby is, dismissed.

Minnesota Department of Human Rights

FOR THE DEPARTMENT BY:

Dated: November 30, 2018

Kevin M. Lindsey, Commissioner